112-273

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1049.~~ ~~695~~ ~~697~~ 95

ROBERT GRAME, EXECUTOR OF JOHN GRAME, DECEASED,
PLAINTIFF IN ERROR,

vs.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 14, 1881.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on Thursday, November 25th, 1880.

Be it remembered that heretofore, to wit, on the 31st day of May, 1879, came Robert Græme, executor of John Græme, deceased, by counsel, and filed his petition, praying that a writ of error and supersedeas be awarded him from a judgment rendered by the circuit court of the city of Richmond on the 15th of June, 1877, in a suit in which the petitioner was plaintiff and the Mutual Assurance Society of Virginia against Fire on Buildings was defendant, which petition, with a transcript of the record accompanying the same, is in the words and figures following, to wit:

1½ *Petition.*

GRÆME'S EXECUTOR
v.
THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA against Fire on Buildings.

To the honorable Joseph Christian, one of the judges of the supreme court of appeals of Virginia:

The petition of Robert Græme, executor of John Græme, dec'd, respectfully showeth that the annexed is the transcript of a record of a decree lately rendered by the circuit court of Henrico in a case in which your petitioner was the plaintiff and the Mutual Assurance Society of Virginia against Fire on Buildings was defendant.

The action was covenant upon a policy of insurance, which bears date on the 31st of December, 1858, by which the defendant insured certain buildings of the said John Græme in the city of Richmond.

The said buildings were destroyed by fire on the 3d day of April, in the year 1865, without, as the declaration alleges, any fault or default on the part of the said John Græme, who was then alive

The defendant pleaded three several pleas, to wit:

1st. That they are not liable to the plaintiff because by the 12th section of the 10th article of the rules and regulations of the said society they are exempted from all liability for damage by fires which may be occasioned by civil commotion, by a foreign enemy, and by invasion; and they say that the fire in this case was caused by one or all of these causes.

2 II. If it was not, the plaintiff is estopped to claim the damage by the fact that John Græme erected other buildings upon the lot upon which his burnt buildings stood, and insured them in the office of the defendants, and was allowed credit for part of his premiums paid upon the former buildings for the time which elapsed after the fire and before the expiration of the year.

III. Because he waived his right to claim his damage by his omission to take the preliminary steps and offer preliminary proofs.

Your honor will find the case fully and distinctly stated in print in the papers herewith filed as a part of this petition, marked Robert Græme, executor of John Græme, and Vial's Executor vs. The Mutual Assurance Society of Virginia against Fire on Buildings, and especially on pages from 1 to 5 inclusive.

The circuit court, passing over all other questions, decided the cause for the defendants upon the plea of estoppel, as the court will find in the printed opinion and judgment of the court at page 33 of the record.

In that opinion, as the court will find, the circuit court founds its judgment mainly, if not exclusively, upon the testimony of one witness, named Henry D. Danforth.

The court will find that the circuit court has entirely misstated the testimony of that witness, as well as misunderstood, and therefore misapplied, the law of estoppel. The errors both of law and fact your honors will find clearly and fully stated in the printed document marked "Vial's Executor vs. The Mutual Assurance Society of Virginia against Fire on Buildings," which your petitioner prays may be taken as a part of this petition, especially from page 9 to the end.

Your petitioner therefore prays that an appeal and supersedeas may be awarded him.

ROB'T GRÆME,
Executor of John Graeme, dec'd.

We are respectfully of opinion that this judgment, complained of in the foregoing petition, ought to be reviewed.

JAMES LYONS,
W. W. GORDON,
Counsel for the Petitioner.

Writ of error and supersedeas awarded. The petitioner being a personal representative, no bond is required.

JOS. CHRISTIAN.

MAY 31ST, '77.

To the clerk of the supreme court of appeals at Richmond.

VIRGINIA:

Pleas before the circuit of the city of Richmond, held at the court-room in said city on Friday, June 15th, 1877.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the circuit court of the city of Richmond, on the 3d day of October, 1870, came John Graeme, by his attorney, and filed his declaration against The Mutual Assurance Society of Virginia of a breach of covenant; which declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the city of Richmond, city of Richmond, to wit:

John Graeme complains of The Mutual Assurance Society of Virginia, which has been summoned, &c., of a breach of covenant: For that the plaintiff heretofore, to wit, on the 31st day of December, 1858, was interested in a certain building then occupied by the Merchants' Insurance Company, Taylor, Darracott, and others, situated on the south of Main and corner of 12th street, in the said city of Richmond, between the tenement of Corbin Warwick, southeast, and Twelfth street northwest, and the property Joseph Allen, to the

value of $20,000, and so continued interested until the destruction of said building by fire, as hereinafter set forth; and the said defendants on the same day, in consideration of a premium in money then and there paid them therefor by the plaintiff, made a policy of insurance upon the said building, and thereby covenanted and agreed with the plaintiff to insure fourteen thousand four hundred dollars ($14,400.00) thereon from the said date, to wit, the said 31st day of December, 1858, against all such losses or damages as should happen to said building by fire or lightning after twelve o'clock meridian of said day to the amount aforesaid to be paid to the said plaintiff.

And the plaintiff avers that afterwards, and while the said policy was in force, to wit, on the 3rd day of April, 1865, the said building was totally consumed by fire, without any fault or default on the part of the plaintiff, yet the said defendants have not kept their said covenant and agreement, although often thereto requested, but have broken the same, and still refuse to keep the same, to the
4 damage of the plaintiff $40,000. Wherefore the plaintiff brings suit.

JAMES LYONS,
JOHN HOWARD, *P. Q.*

Whereupon the defendant being summoned, and not appearing, on motion of the plaintiff, by his attorney, it was ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff had sustained by reason of the non-performance of the covenants and agreements in the declaration mentioned, unless the defendant should appear and answer the plaintiff's action at the next rules.

At which day, to wit:

At rules held in the clerk's office of the said court on the last Monday in October, 1870—

The defendant still failing to appear, on motion of the plaintiff, by his attorney, it was ordered that the last order made against it in this cause be confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to wit:

At a circuit court, continued and held at the court-room in said city, on Monday, the 14th day of November, 1870—

Came the parties, by their attorneys, and the defendant demurred generally to the plaintiff's declaration, in which demurrer the plaintiff joined. And the defendant plead covenant performed, and put itself upon the country, and the plaintiff likewise; and, thereupon, on motion of the defendant, it was ordered that the judgment obtained in the office and the order of a writ of enquiry of damages be set aside.

And at another day, to wit:

At a circuit court, continued and held in the court-room in said city, on Friday, the 8th day of November, 1872—

The plaintiff in the foregoing suit being dead, on motion of the defendant, it is ordered that his death be suggested on the record.

At another day, to wit:

At a circuit court, continued and held at the court-room in said city, on Wednesday, February 5th, 1873, the death of the plaintiff
5 in this suit having been suggested, on motion of Robert Græme, executor of the plaintiff, no good reason being assigned against it, it is ordered that this suit be revived in his name as plaintiff.

And at another day, to wit:

At a court held as aforesaid, on Monday, 19th day of May, 1873, on the motion of the defendant it is ordered that this cause be continued until the next term.

And at another day, to wit.

At a circuit court of the city of Richmond, held at the court-room in said city on Friday, June 15th, 1877, being the day and year first herein mentioned—

Came the parties by their attorneys, and the defendant withdrew its demurrer to the plaintiff's declaration, and the plaintiff his joinder therein; and thereupon, by consent of parties by their attorneys, leave is given the plaintiff to file a new declaration in lieu of the former declaration filed herein. The defendant then pleaded "covenants not broken," to which the plaintiff replied generally, and put himself upon the country, and said defendant did likewise; and the parties by counsel agreed that under this plea any defence may be made which by any form of pleading to this action could be available to the defendant; and thereupon the parties by their counsel waived a jury for the trial of this cause; and agreed that the whole matter of law and fact may be heard and determined and judgment given by the court; and the evidence and arguments of counsel being fully heard, it is considered by the court, for reasons stated in writing and filed in the papers of this cause and made a part of the record, that the plaintiff take nothing by his bill; that the defendant go thereof without day and recover against the plaintiff its costs by it about its defence herein expended, to be levied of the goods and chattels of the plaintiff's testator in his hands to be administered.

And thereupon the plaintiff by his counsel moved the court to set aside the said judgment and to grant him a new trial; which motion the court overruled.

MEMORANDUM.

The plaintiff this day excepted to the opinion and judgment of the court given against him on the trial of this cause, and leave is given him to tender his bills of exceptions to said opinion and judgment at any time within ten days from this day.

6 And at another day, to wit, at a circuit court continued and held at the court-room in said city on Saturday, June 23d, 1877—

Came again the parties by their attorneys, and the plaintiff by virtue of the leave given him on the 15th of June, 1877, this day tendered to the court his bill of exceptions to the opinions and judgment of the court given against him in this cause on that day, which was received by the court, signed and sealed, and ordered to be made a part of the record of said trial.

Which bill of exceptions is in words and figures following, to wit:

Bill of exceptions.

ROBERT GRÆME, EXECUTOR OF JOHN GRÆME,
vs.
THE MUTUAL ASSURANCE SOCIETY AGAINST Fire on Buildings of the State of Virginia.

In the circuit court of the city of Richmond.

Be it remembered that upon the trial of this cause by the court instead of a jury, and the decision thereof by the court, the plaintiff by

his attorney excepted to the decision of the court as injurious to him upon the evidence and the law of the case, and thereupon the court doth certify that the following was the case as submitted by the parties by their respective attorneys:

Agreement of May 31st, 1877.

Cir. court of Richmond City.

GRÆME, EX'OR OF GRÆME,
v.
THE M. A. SO. OF VA.

At the trial of this cause by the court instead of a jury the plaintiff introduced in evidence on his part—

1. The policy of the defendants, No. 19656, dated the 31st day of December, 1858, mentioned in the declaration, which is in the words and figures following, to wit.

Policy of assurance.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

No. 19656.

This policy of assurance (for the revaluation of the buildings declared for, per former declaration, No. 16194) witnesseth that
7 John Græme, residing at Richmond, in the county of Henrico, has entered for assurance against loss or damage by fire in the Mutual Assurance Society against Fire on Buildings of the State of Virginia, per his declaration No. 19656, filed and recorded in the general office, the following buildings occupied by the Merchants' Insurance Company, Taylor, Darracott & others, situated on south of Main and corner of 12th street, between the tenement of Corbin Warwick southeast said Twelfth street northwest, and property of Joseph Allen southwest, in the said town of Richmond and in the county of Henrico, to wit:

8 Buildings used as—	Marked.	The walls built of—	The roof covered with—	Valued at—	Nett amount insured.	Premium.
				Dollars.	*Dollars. Cents.*	*Doll's. C'ts.*
Offices, dwelling, &c	A.	Brick.	Slate.	6,000	4,800 00	72 00
Offices, &c	B.	Brick.	Tin.	6,000	4,800 00	72 00
Grocery, dwelling, and addition	C.	Brick.	Slate.	5,000	5,000 00	60 00
Kitchen, lodging-rooms, &c	D.	Brick.	Tin.	1,000	800 00	12 00
					$14,400 00	$216 00

9 Which sum of fourteen thousand four hundred dollars is the real sum insured, and on which there has been paid one hundred and ninety-five 92-100 dollars premium; and now this day twenty 08-100 dollars additional premium; and he, the said assured, having by the above-mentioned declaration agreed for himself and his heirs, executors, administrators, and assigns to abide by, observe, and adhere to the constitution, rules, and regulations of this society, which are already, or may hereafter be, established for the said assurance society:

Now, know all men by these presents, that the aforesaid assurance society shall be subject and liable to pay, agreeable to the acts of the legislature of Virginia, and the constitution, rules, and regulations which are already, or may hereafter be, established for the said assurance society unto the said assured, or to his heirs, executors, administrators or assigns, all such losses or damages as shall happen by fire or lightning after 12 o'clock m. of this day to the above-mentioned buildings, according to the true intent and meaning of the said acts of the legislature of Virginia, and the constitution, rules, and regulations of the said society as aforesaid; provided, that the aforesaid buildings are at this instant in existence, and that if they or any part thereof are, or hereafter shall be, insured elsewhere, this policy shall be void.

In witness whereof the principal agent of the said society has signed this present policy with the seal of the office annexed (the same having been countersigned by his chief clerk), at the city of Richmond, this thirty-first day of December, one thousand eight hundred and fifty-eight.

J. RUTHERFOORD. [SEAL.]

Countersigned:

J. B. DANFORTH,
Chief Clerk.

2. The charter, the constitution, rules, and regulations of the defend ant society, in printed pamphlet, as published by the society, is not inserted by suggestion of counsel, it being printed matter.

3. The statement of agreed facts made by the parties by their counsel, and filed in this cause June 22d, 1874, in the words and figures following, to wit:

Statement of agreed facts.

GRÆME, EX'OR OF GRÆME,
vs.
THE MUTUAL ASSURANCE CO.

The following are agreed as facts in this case, to wit:

That on the 3d day of April, 1865, Richmond City was evacuated by the Confederate army; that before the evacuation General Lee, the commander-in-chief, issued an order to his subalterns, Gen'l Ewell and Major Carrington, provost marshal of the city, commanding them to burn all the tobacco in the city before the city was evacuated; that, in obedience to that order, they prepared all the tobacco to be burnt, taking the utmost care of which they were capable to guard against the extension of the flames from the tobacco to any other property; that on the morning of the day on which Richmond was evacuated, being a still morning, the tobacco in Shockoe warehouse was fired in obedience to the said order. After it was fired the wind rose and blew freshly from the southeast to the northwest. That the buildings owned by John Græme were situated to the northwest, distant about three or four squares from the tobacco warehouse aforesaid, with a broad street, called Cary street, also intervening; that, by force of the wind, the fire was extended from the building in which the tobacco was, viz, the said Shockoe warehouse, until it reached and consumed the buildings of the plaintiff, which were insured by the defendant by the following policies of insurance (see rec., pp. 8, 9, 10), upon which the premiums of insurance had been regularly paid up as they

became due prior to the fire. For some time, months after the fire, there were no courts held in Richmond, and no judicial or other legal proceedings had.

The foregoing facts are mutually agreed between the parties, and it is further agreed that either side, pl't'ff or def'd't, is at liberty to prove any other or further fact deemed material by them and pertinent to this or the other cases upon the trial of this cause; and it is further agreed that this agreement shall apply as well to this cause and the other two causes depending in this court as to the two causes depending in the chancery court of Richmond. The three cases in this court are styled as in the caption to this paper, and the two cases in the chancery court of Richmond are styled respectively Jas. E. Lipscomb, surviving partner of Alvey & Lipscomb, vs. The Mutual Assr. Society and Wellington Goddin, ex'r of Seymour P. Vial, dec'd, vs. The Mutual Assr. Sooiety.

JAMES LYONS,
Att'y for the Pl't'ffs in each of the cases.
W. W. CRUMP,
JAMES NEESON,
Counsel for Def'd'ts in each of the cases.

JUNE 22, 1874.

4. Correspondence between James Lyons, esqr., as pl'ff's counsel, and H. A. Claiborne, agent of the defendant, in letters, of which the following are copies, to wit (of Mr. Lyons, dated 17 May, 1870; Claiborne's, dated 18 May, 1870; Lyons, dated 24th May, 1870; and Claiborne, dated 23d May, 1870):

11 *Correspondence.*

RICHMOND, *May 17th*, 1870.

To H. A. CLAIBORNE, Esqr., *P. A. M. A. S.*:

DEAR SIR: Mr. John Grame has placed in my hands sundry policies of insurance of his property (which was destroyed by fire in April, 1865) by the Mutual Assurance Society, with a view to recover the am't of the policies. I should be glad to hear from you upon the subject, as an amicable adjustment would be much more agreeable to me than a lawsuit.

Very respectfully, y'rs,

JAMES LYONS.

[Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, *May 18th*, 1870.

JAMES LYONS, Esqr., *Richmond, Va.:*

DEAR SIR: I am in receipt of your note of the 17th inst., in which you state that Mr. John Grame has placed in your hands "sundry policies of insurance of his property (which was destroyed by the fire in April, 1865) by the Mutual Assurance Society with a view to recover the amount of the policies."

In reply I respectfully refer you to sect. 12, art. 10 of the "constitution, rules, and regulations" of this society, which is in these words:

"No policy whatever which may be issued shall bind the society to

answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

It may be proper to state that but two similar applications have been submitted, and upon investigation by two able lawyers in this city they were promptly abandoned.

I have only to add that it would be easy to establish the fact that the destruction of the property referred to resulted from a risk never assumed by this society, and hence the demand you make cannot be entertained.

Very respect'ly,

HERBERT A. CLAIBORNE,
Pr. Agent.

12 RICHMOND, *May 24th*, '70.

DEAR SIR: Mr. Howard, who is associated with me, and myself, have examined the clause of your constitution to which you referred me, and do not find anything in it to prevent Mr. Grame's recovery, but, as we do not wish to institute any unnecessary suit, if you will be so good as to shew the opinions of the counsel to which you refer we will examine them candidly, and if satisfied by them that we are wrong we will not sue

Yours, truly,

JAMES LYONS.

To H. A. CLAIBORNE, Esqr.

[Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, *May 23d*, 1870.

JAMES LYONS, Esqr., *Richmond, Va.:*

DEAR SIR: In reply to yours of the 24th inst. in reference to the supposed claim of Mr. John Grame, I have nothing to add to mine of the 18th inst., except to repeat that the claim cannot for a moment be entertained.

I then stated that but two similar applications had been submitted, and upon investigation were promptly abandoned by counsel.

The opinions of those counsel, if reduced to writing, and for which you ask, are not in our possession, nor have we seen them.

Very respect'y, yours,

HERBERT A. CLAIBORNE,
Pr. Agent.

5. Affidavits and statements of certain persons, namely:

Of W. Goddin, one dated 12 Jan'y, 1877, and another dated 30 Jan'y, 1877; of M. Wickham, dated February 15, 1877; of James A. Scott, dated May 16, 1877; of B. S. Ewell, dated 5th Nov., 1873; and of I. H. Carrington, dated 12th Nov., 1873, which are accepted as evidence so far as they are not inconsistent with or contradictory of the facts stated in the aforesaid agreement of 22 June, 1874, and to avail as far as may be lawful and relevant. Also paper marked "diagram," indicating streets and localities mentioned in the cause.

13 *Affidavit of W. Goddin, dated 12th Jan'y, 1877.*

CITY OF RICHMOND, *to wit:*

This day Wellington Goddin personally appeared before me and made oath that in the year 1865 or 1866, soon after Mr. John Graeme's houses were burnt, he called on Col. John Rutherfoord, then the principal agent of the Mutual Assurance Society vs. Fire on Buildings, and asked him if he would pay the losses, and the col. replied that the society could not pay because the fire which destroyed the buildings was an act of war.

Given under my hand this 12th day of January, 1877.

JOHN T. GODDIN, *N. P.*

Affidavit of W. Goddin, dated 30th Jan., 1877.

This day Wellington Goddin personally appeared before me and made oath that he was well acquainted with the property of the late John Graeme, situated at the southwest corner of the square bounded by Main and 12th streets, and fronting on both Main and Twelfth streets. Early in the morning of the 3d April, 1865, before the Federal army entered the city of Richmond, the tobacco warehouse situated below the basin very near to and below Warwick's mill, from which it was separated only by 12th st., and very near to the James River Canal, was set on fire, as this affiant understood and believes, by the Government of the Confederate States. That when it was set on fire there was no unusual wind blowing, but soon after it was set on fire a high wind arose, blowing from the south rather to the northwest, and the fire was driven to Warwick's mill, which was a very large and tall building, and thence to the property lying north of it, until it reached and consumed the property of Mr. Graeme, consisting of five houses. That Mr. Graeme's houses were distant from the warehouse about one thousand (1,000) feet, and according to the best belief and personal observation of this affiant the fire from the warehouse could not have reached the property of Mr. Graeme without the high wind which prevailed; that by that high wind it was carried to and beyond Mr. Graeme's property across Main street, and consumed a great deal of property there. A good deal of the property of this affiant was consumed by the same fire, and his attention was very much directed to the fire and all the circumstances connected with it. That the Federal troops came into Richmond while the fire was in progress and rendered most efficient aid in arresting its progress, and, as far as this affiant saw and heard, did nothing to increase it or produce disturbance.

14 This affiant knew Col. John Rutherfoord, the principal agent of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, and was informed by him soon after the fire that his society would pay him nothing on account of it because it was an act of war, and it very soon became matter of notoriety in the city of Richmond that the society would not pay anything on account of that fire, and thereby this affiant and Mr. Graeme, as well as others, were deterred from taking any steps for the recovery of their losses. From all that this affiant saw or heard, and he had the best opportunity for both seeing and hearing, he is satisfied that the original fire was caused solely by the officers of the Confederate Government, and but for the very high wind would not have extended as far as the property of Mr Graeme or any other property on Main street or north of it.

W. GODDIN.

Sworn by W. Goddin in my presence and before me, a notary public in and for the city of Richmond, this 30th Jan., 1877.

JOHN T. GODDIN, *N. P.*

I beg leave to amend the foregoing affidavit by making the following addition: Whilst I am not distinct as to my recollection of the character of the wind I well remember that the Gallego mills were previously twice destroyed by fire, and in neither case did the fire extend to the north side of Cary street, but on one occasion it did extend to the south side of that street and destroyed most of the brick tenements between Eleventh and Twelfth streets. So large were the coals of fire on the morning of the evacuation of Richmond that at my residence on Sixth, between Clay and Leigh streets, my family had to place buckets of water on the back porch to keep it from taking fire, and it seems to me perfectly certain that but for the high wind these large coals of fire could not have been carried to my residence, a distance of about half mile from the Gallego mills.

W. GODDIN.

Affidavit of Maclurg Wickham, Feb'y 15th, 1877.

In the spring or summer of 1865, and certainly very early after the fall of Richmond, being in the city, I asked the late Col. John Rutherford, who was the principal agent of the Mutual Assurance Society of Virginia, whether the company would pay the losses occasioned by the fire of April 3d, 1865, by which a great many buildings were destroyed, and he promptly replied, "Certainly not." I myself had property insured in that company, but had no buildings burned.

MACBURY WICKHAM.

15 RICHMOND, VIRGINIA, *February 15th*, 1877.

Affidavit of James A. Scott, May 16th, 1877.

STATE OF VIRGINIA,

City of Richmond, to wit:

This day personally appeared before the undersigned, a notary public, in and for the city aforesaid, James A. Scott, and deposed as follows:

That for many years prior to the late war he was engaged in the tobacco business in the city of Richmond; that during and at the close of the war he was interested in the ownership and control of a large amount of leaf tobacco, and that he had for a long while been a member of the city council of Richmond; that when it was understood on Sunday the 2nd April, 1865, that the city was to be evacuated by the Confederate Government upon the approach of the United States forces, he was appointed by the council of the city one of the committee to meet the enemy and surrender the city; that some time after midnight on the morning of the 3d April, 1865, he in company with other members of the committee, and with Judge John A. Meredith and Judge William H. Lyon, who had been requested by the council to act with the committee, and with Joseph Mayo, esqr., mayor of the city, went out to meet the enemy and surrender the city; that having taken a position and awaited their arrival, the party after a while were met by the enemy, when a formal surrender of the city was made; that this was about two miles from the corporation line on the Osborne Turnpike near the James River; that the Federal commander stated on the occasion to Mr. Mayo,

the mayor, that he would at once send a party forward to destroy all the liquor in the city before the arrival of the main body of the troops, when he was informed by Mayor Mayo that his action had been anticipated by the city council, who had already had everything of the kind destroyed; that on returning towards the city, and when about a mile and a half distant upon an elevated point of the road, he saw that the tobacco warehouses in the city were on fire, and among them two belonging to his mother, situated on 21st street, in which a large amount of tobacco was stored; this was about sunrise.' The morning was calm and bright. Sometime afterwards the wind arose from the southeast and blew strongly across the city and the whole city was in great danger of conflagration thereby; that on taking possession of the city the United States army did not seize any tobacco belonging to private persons so far as this affiant ever knew or heard; he and his brother-in-law, Mr. Clark, were fortunate enough to save some $10,000 worth of tobacco, by having it stored in a house distant from the ware-
16 houses—although they gave a list of it with their other tobacco to the Confederate Government in due time for its destruction. This tobacco some two or three weeks after the capture of ths city, with the full knowlddge of the officers of the United States army, Mr. Clark and himself shipped at the dock in a schooner via New York for Liverpool and London, receiving astonishing large prices therefor. Other citizens of Richmond, owners of tobacco, sold it here and elsewhere without molestation from the Federal Government, which, so far as the affiant ever heard, never troubled any tobacco in Richmond except that which belonged to the Confederate Government.

JAMES A. SCOTT.

Sworn to before me this 16th day of May, 1877.

J. L. APPERSON, *N. P.*

Statement of Col. Benj. S. Ewell, a member of Gen. Ewell's staff, in relation to the burning of Richmond in 1865, *made Nov. 5th*, 1873.

Shortly after the capture of Savannah by General Sherman, a law was passed by the Confederate Congress requiring military commanders to destroy all articles of value within their commands rather than let them fall in the hands of the hostile forces. A month or two before the evacuation of Richmond, General Lee sent a notice to General Ewell of this law, with directions that steps be taken to carry it out should it become necessary to give up the city. It was suggested that to prevent risks, as far as possible, of a general conflagration the city authorities be at once consulted and the articles to be destroyed (tobacco, of which there was a large quantity in the city, and which could only be destroyed at short notice by firing, was especially mentioned) stored in isolated buildings. General Ewell had frequent consultations with the mayor and other city authorities, and with the holders of the tobacco, which resulted in the selection of certain warehouses from which the flames would not, it was thought, spread should it become necessary to apply the torch for the purpose of destroying the tobacco they contained.

Every step was taken by General Ewell to prevent disastrous results in the event of executing the order. It was a matter that gave him much anxiety, and to which he gave much time and attention. The final orders were given on the night of the evacuation of the city by the Confederate forces by General Ewell, he acting under the commands of his military superiors to apply the torch, and it was done about day-

break on Monday morning. The fire spread rapidly, partly by
17 the neglect of the fire brigade and partly by incendiaries. Soon the wind from the southeast became brisker, and the entire city—the flames began at the southeast—was in imminent danger of falling a prey to the advancing conflagration. It was checked about 1 p. m. of Monday principally by the exertions of the division of the United States Army that belonged to the command of General Wetzel, and which first entered the city. To the credit of this officer it ought to be known that when his command, consisting of two divisions, one white, the other colored troops, the latter being in front, approached the city, he changed the order of his march, and put the white soldiers in front when he saw the fire, as being less likely to commit excesses, and being more skilled and experienced in extinguishing fires. This is the substance of my knowledge of the burning of the city.

BENJ. S. EWELL.

Statement of I. H. Carrington.

RICHMOND, *November 12th*, 1873.

I am requested to state my knowledge of facts connected with the fire of April 3, 1865, in the city of Richmond. I was at that date provost-marshal of the city under the appointment of Secretary of War of the Confederate States. I reported to General Ewell as my commanding officer in all matters relating to the city. Some weeks before the evacuation of Richmond, General Ewell sent for me, and informed me that he had orders to destroy all tobacco, cotton, and military and naval stores in the city in the event that its evacuation became necessary. He instructed me to make enquiry as to the amount and location of these articles in the city. I soon after reported to him that there was no considerable quantity of any of these articles excepting tobacco, of which there was a large quantity.

General Ewell took steps for having the leaf tobacco in the city, as far as possible, kept in Shockoe warehouse and in Von Gronin's warehouse on Cary street, and in the warehouse at the Petersburg depot. We had frequent conversations on the subject, in which he deplored the necessity for executing the order and expressed the hope that it could be avoided.

On Sunday, April 2, 1865, General Ewell sent for me, informed me that the city must be evacuated, and directed me to prepare for burning the warehouses aforesaid, but not to apply fire until the last moment.

I sent officers to these three warehouses with orders to prepare combustibles in such manner that they could be quickly fired and to place a sufficient guard at each to prevent any disturbance. I also
18 sent an officer to communicate with the chief of the fire department of the city, to inform him of the location of fire, and to request him to have the firemen and their engines on the ground to prevent the spread of the flames. The officer reported that he had communicated with the person second in authority, the chief of the fire department being out of the city. During Sunday night I was several times at the office of the Secretary of War (General Breckinridge). I recollect that I informed him of the orders I had received and of the action taken. He said that it was a necessity; that the orders must be carried out, with all precautions taken to prevent a spread of the fire.

My orders from General Ewell were to remain in the city as long as

I could with safety and to preserve order as far as possible with the troops under my command, and to fire the tobacco before I left. General Ewell and General Breckinridge left the city together by way of Mayo's bridge, about or a little before daybreak of Monday, 3rd of April. I parted with them at corner of Fourteenth and Cary streets as they rode off. General Ewell said to me, just as he left, that the firing of the tobacco could not be longer delayed. I gave the orders to two of the men with me, and they at once communicated them to the officers on guard at the warehouses. The fire was applied at once at Shockoe and Von Gronin's warehouses. The officer at the warehouse at the Petersburg depot sent me word that a number of wounded Confederate soldiers had been laid in the warehouse and that they could not be removed. I directed the combustibles collected at that place to be removed, and countermanded the order for burning it.

The night was remarkably still. I remarked the fact, several times during the night, that there was not a breath of air stirring. Very soon after the warehouses were fired the wind rose from the southeast, and in a short time quite a breeze was blowing from that direction. I left the city just about sunrise on Monday morning by the river road or plank road, going up the river.

ISAAC H. CARRINGTON.

And the defendant introduced in evidence on its part, 1st, a copy of the record of the proceedings of the standing committee of the defendant society of the 17th May, 1865, duly certified, in the words and figures following, to wit:

19 *Proceedings of the standing committee, May 17th, 1865.*

[Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, , 18 .

At a meeting of the standing committee of the Mutual Assurance Society, held on the 17th of May, 1865:

* * * * * * *

The following communication was laid before the board:

The collector for the city of Richmond (Mr. S. T. Pulliam), in consideration that no legal claim can be made for losses sustained by the great conflagration which occurred upon the evacuation of our city on 3d April last, respectfully suggests that the quotas of the present year be remitted on all buildings destroyed by that fire. These quotas having been increased one hundred per cent., and only one-fourth of the year having expired at the date of the fire, the collector apprehends serious difficulty in collecting from members who may be required to pay quotas on insurances rendered null and void under the rules of the society. Many, he thinks, will regard any such demand as a peculiar hardship, and of those who may not refuse to pay, many he apprehends will withdraw their insurances, thereby doing the society more damage than can be compensated for by the collection of such quotas.

The collector having asked for instructions on the subject, the question involved is respectfully submitted to board with the simple suggestion that any rule or policy which may be adopted should also apply to other towns where insured buildings have been destroyed under similar circumstances.

J. RUTHERFOORD, *P. Ag't.*

MAY 17TH, 1865.

On consideration, it was ordered that the quotas of 1865 be remitted on all insured buildings destroyed by fire upon the evacuation of Richmond (April 3d, 1865), and on other insured buildings in the State burnt under similar circumstances.

* * * * * * *

20 A true copy from the record.

H. D. DANFORTH,
Secretary.

2. A copy of the resolution adopted at a meeting of the standing committee of the dft. society, 31st July, 1865, duly certified in the words and figures following, to wit:

Resolution of standing committee, 31st July, 1865.

[Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, , 18 .

At a meeting of the standing committee of the Mutual Assurance Society, held on 31st of July, 1865.

* * * * * * *

On motion,

Resolved, That section 4th, article 11th of the constitution, rules, and regulations shall be construed to apply to insured buildings destroyed during the war under circumstances exonerating the society from liability for loss.

* * * * * * *

A true copy from the record.

H. D. DANFORTH,
Secretary.

The following is section 4 of article 11:

Sec. 4. When an insured building shall be removed from the ground on which it stood at the time it was *declared*, or shall be taken down and the proprietor of the land shall erect another house on the same site, in either case such house may be declared for assurance by a declaration of revaluation, and the premium formerly paid for insurance thereon shall be credited against the premium which may arise on such declaration of revaluation, and the additional premium, if any, being paid, a new policy shall be issued on the delivery of the old policy at the general office; provided, however, that the principal agent may reject the risk offered on any such removed or substituted building if in his opinion the increased hazard thereof shall make it expedient to do so.

3d. The affidavit of Henry D. Danforth of Jan'y 4th, 1877, to wit:

21 *Affidavit of Henry D. Danforth.*

[Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, *January 4th*, 1877.

I, Henry D. Danforth, do certify that on the 15th day of January, 1867, a policy of insurance was entered on the register of the Mutual

Assurance Society insuring to John Grame $20,000 on the three buildings situated on the south side of Main, east of Twelfth street, in the city of Richmond, and the two buildings in rear fronting on Twelfth street. Upon these the premiums charged was $312.50, which was credited by $321, the amount of the premiums which had been previously paid on the buildings occupying the same site which were burned on the 3d of April, 1865, and Mr. Grame was therefore required to pay no premium upon the insurance of this property, but only the annual quota for the year 1867, which in this case amounted to $125.00, and was the same which would have been charged upon a similar risk for the same amount if it had been insured for years preceeding. A day or two after the entering of the policy Mr. Grame called at the office, and in my presence paid to Mr. Samuel T. Pulliam, agent and collector of the Mutual Assurance Society, the one hundred and twenty-five dollars, and a personal fee of three dollars for making survey. At the same time he enquired if the insurance companies were liable for the losses occasioned by the fire of the 3d of April, 1865. He was informed that there was a war clause in the policies of all the companies, that the fire referred to was the result of war, and that there was no liability as the risk was specially excepted against. He was also informed that owing to the absence of liability our board has passed a resolution authorizing new buildings to be insured, and the premiums to be credited with those formerly paid on the buildings burned by that fire, which had occupied the same site, and it was by virtue of this resolution, and in consequence of the absence of liability, that the credit heretofore referred to had been given him in effecting the insurance just made. He appeared to be entirely satisfied, and, after some further conversation, left. No demand for payment under his policies was made at any time until May, 1870, when a letter was received from Mr. James Lyons of which the following is a copy:

22 RICHMOND, *May 17th*, 1870.

To H. A. CLAIBORNE, Esqr., *P. A. M. A. S.:*

DEAR SIR: Mr. John Grame has placed in my hands sundry policies of insurance of his property (which was destroyed by fire in April, 1865) by the Mutual Assurance Society, with a view to recover the amo't of the policies. I should be glad to hear from you upon the subject, as an amicable adjustment would be much more agreeable to me than a lawsuit.

Very respectfully, y'rs,

JAMES LYONS.

No estimate or proof of loss, as required by the constitution, rules, and regulations of the society, have ever been filed in the office. I have been continuously in the employ of the Mutual Assurance Society from the 5th of June, 1865, to the present time, and am now the secretary of the society.

H. D. DANFORTH.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, J. M. Murray, a notary public for the city aforesaid, in the State of Virginia, do certify that Henry D. Danforth personally appeared before me, in my said city, and having signed the within certificate, made oath to the truth of the statements therein contained.

Given under my hand this 18th day of January, 1877.

J. M. MURRAY, *N. P.*

Which are accepted as evidence to avail as far as may be lawful and relevant.

Agreed to.

JAMES LYONS,
JOHN HOWARD,
Counsel for the Plaintiff.
W. W. CRUMP,
For Defendant Co.
JAMES NEESON,
For Defendants.

MAY 31ST, 1877.

And the court doth certify that the foregoing was all the evidence in the case. And the plaintiff having excepted to the opinion and decision of the court in favor of the defendant, prays that this his bill of exceptions may be signed, sealed, enrolled, and made part of the record, with the certificate of evidence aforesaid; which is accordingly done, this 23d day of June, 1877.

B. R. WELLFORD, JR. [SEAL.]

23 *Opinion of the court.*

In the circuit court of the city of Richmond.

GRÆME *vs.* MUTUAL ASSURANCE SOCIETY. } Opinion of Judge B. R. Wellford. June term, 1877.

This case is submitted to the court upon the plea of covenants not broken, with benefit conceded to defendant of any defence which might be made by any form of pleading to the action. This latitude of defence, and the very peculiar circumstances under which the loss of the plaintiff's testator was incurred, and which surrounded the underwriter and the insured subsequent thereto, have brought under discussion many points of difficulty and interest. The discussion has been full and elaborate, and conducted upon both sides with eminent zeal and ability.

A logical consideration of the case brings me, first, to the examination of the defense that the plaintiff is debarred from asserting any claim under the policy sued out by an equitable estoppel. If this defence be maintainable, it is apparently unnecessary to the conclusion of this litigation to proceed any further. The plea concedes that the plaintiff's testator may have had a valid legal claim to the full extent now asserted, and that if such claim had been promptly prosecuted after the loss had been incurred, all the other defences set up by the defendant might have been properly overruled.

It denies the right of the plaintiff to have the original validity of the claim determined, and rests the defendant's immunity from liability upon the sole ground of the surrender of such right since it had accrued by the testator of the plaintiff. It is very manifest that the courts will not be prompt to favor such a defence, and must reject it unless it be clearly established that the surrender of such right was intelligently made and based upon a consideration either of enquiry to the defendants or of benefit to the plaintiffs incurred, which may rightfully claim to be regarded as valuable in law. But if such fact be clearly established, the defence is commended to the favor of the courts by many of the fundamental principles of the law. In the settlement

of controversies, as well as in the execution of contracts, the broadest latitude of discretion is the inherent right of the parties in interest. It is not the office of the courts to undo intelligent settlements and reopen closed controversies any more than it is to make or reform contracts; upon the contrary, interest rei publicæ ut sit finis litium.

24 What, then, are the facts material to an intelligent considera- of this plea of the defendants?

It appears that the plaintiff's testator by three several policies—one of which is declared upon in this suit—had insured with the defendants certain brick and slated buildings, situated in the city of Richmond. The consideration, and the only consideration upon which the defendants assumed the hazard of the insurance, was the payment in advance of a sum of money called a premium, and the payment thereafter of annual assessments styled quotas. These quotas, by the rules of the society, of which by virtue of the insurance the insured was a member, accrued upon the 1st day of January in each year, but were not payable until the 1st day of April thereafter; and until the 1st day of July thereafter the insured was not accounted in default for non-payment. (Art. 7, sec. 14.) The defendant corporation is a mutual-insurance company, and by virtue of its charter has a lien for its dues upon the insured premises and a right to coerce payment from delinquents by summary proceedings in the courts of law, and in consequence of these privileges imposes upon its insured no forfeitures of rights under the policy for default in payment ad diem. It is one of the admitted facts in this cause that the premiums of insurance had been regularly paid up as they became due prior to the fire. The fire occurred upon Monday the 3d of April, 1865, and though the premium had been demandable upon the preceding Saturday, the insured was not in default if it were unpaid, and therefore this agreement of facts does not seem to me to embrace the quota of 1865; and the resolution of the society, hereafter to be alluded to, releasing the quotas of 1865 upon all buildings consumed in the same calamitous fire, would seem to imply that no demand had been made of or payment made by the insured upon his policies for that year. This construction of the language of the agreement of facts is sustained by the receipts filed in the papers of the cause from 1858 up to and including 1864, but none for 1865. That fire begun at a point some one thousand feet distant from the buildings insured in these policies, in the early morning of the day which witnessed the entrance of the Federal army into the surrendered capital of the Confederate States. It was understood at the time, and it was clearly proven by evidence in these causes, to have originated from the firing of large stores of tobacco by order of the military authorities of the Confederate States to prevent its capture by the enemy.

The circumstances under which this fire occurred were claimed by the defendants to relieve them from all liability for losses by their insured. They claimed, however, to be still entitled in law to demand the quotas of 1865, but in view of the circumstances, the governing board of the society, upon the 17th of May, 1865, resolved to re-

25 mit such quotas upon all the buildings destroyed in that fire.

Again, upon the 31st of July, 1865, the board, in the interest of these sufferers, made another concession. It appears that by one of the general regulations of the society (art. 11, sec. 4), new buildings erected to replace old buildings which had been insured, and were removed by the owners, were entitled to be insured and to have the bene-

fit in the new policies of a credit for the premium paid on the old buildings. This benefit was, by resolution of July 31st, 1865, extended to all buildings erected on insured premises to replace any "building destroyed during the war, exonerating the society from liability for loss."

The claim of the defendants that they were not liable upon their policies for losses by this fire seems to have been at once generally understood in the community, and knowledge of this fact at an early date after the fire is clearly brought home to the plaintiff's testator. He does not appear to have made any demand upon the society, or to have taken any steps to have the extent of his loss ascertained and notified to the company, as required by their regulations. He rebuilt upon the burnt premises, and in January, 1867, insured the new building with the defendant. In making such insurance he was credited, in pursuance of the resolution of the standing committee of the society above referred to, with the old premium, some $325, and simply required to pay annual quotas, as if the buildings had been previously insured. It appears from the affidavit of Mr. Danforth, that at the time of this new insurance he made enquiry about the liability of the society to make good his loss by the fire of April, 1865, and was then distinctly informed that the society repudiated any such liability, and had treated the old policies as extinguished by giving him credit on the new with the original premiums paid. Mr. Danforth states that he seemed to be perfectly satisfied. It is objected in the note of one of the learned counsel for the plaintiff that this statement of Mr. Danforth cannot be relied upon with confidence for its accuracy in consequence of the lapse of time between the events of which he speaks and the date of the affidavit. This objection does not seem to me to merit much weight. Apart from the consistency of the statement with the entire conduct in the premises of Mr. Græme, it is to be remembered that Mr. Danforth had been in the continued service of the company every since the war, and that this very matter was recalled to his attention in less than three years after the interview of which he speaks by the demand asserted against the company in behalf of Mr. Græme in the letter of James Lyons, esq., his counsel, to the principal agent of the society. Be that as it may, the negotiation was consummated; the society assumed the risk upon the new buildings, accepting as the consideration therefor the old premiums, the annual quotas for 1867 and for subsequent years as they might thereafter accrue.

26 The plea of the society assumes that they regarded, and had a right to regard, all claim under the old policies as thereafter abandoned, and any matter of controversy in respect thereto as finally closed. It cannot be questioned that the society honestly entertained and acted upon this idea, and the insured certainly gave encouragement to it by his acquiescence until in May, 1870, a few months before these suits were instituted, he made, through counsel, his first demand for payment under the old policies.

Now, under these facts, can the plea of estoppel prevail? We are not embarassed in considering this question by any technical difficulties as to the matters of formal pleading. The causes are submitted upon issue in one plea with right reserved to the defendant of all defences which might be made under any other proper plea, and the statute authorized the defendant to make by proper plea equitable defence. The question, therefore, is submitted to the court to be determined upon its merits.

It is objected by the plaintiff that he cannot be estopped by reason

of the gross inadequacy of consideration; that a just demand, $30,000 cannot be presumed to have been released for the consideration of some $325.

It is sufficient answer to this objection that the court has no right to enquire into the value of a legal consideration which a person competent to contract has consented to accept as sufficient, unless it appear that his consent has been obtained by fraud. There is nothing in this record to justify the imagining of any fraud practiced by the defendants or any one acting in their interests; and there is no more to authorize the court in imputing to the plaintiff's testator any incapacity for the intelligent discharge of his own business, much less any such incapacity as would have placed him under disability of law to contract. But if there was any warrant for the court to enter upon this enquiry, it would be very difficult even now to condemn the providence and wisdom of the plaintiff's testator. If he did relinquish his claim against the defendants for losses in the fire of April, 1865, for a paltry consideration, to condemn him would involve a condemnation of many fellow-sufferers whose business capacity and sagacity it would require a bold man to question. All the underwriters who were carrying in 1865 risks upon property destroyed in the same fire assumed the same position with the defendants and repudiated any liability to their insured upon grounds substantially the same. They were fortified in this position by the opinion of eminent counsel, under whose advice they acted. Hundreds of thousands of dollars, distributed among hundreds of sufferers, many of them experienced and intelligent and sagacious business men, whose fortunes were wrecked by the disasters of the war, were at stake, and it may be fairly presumed that the best professional counsel and advice were invoked in adverse interest to the defendants. With singular unanimity, however, the sufferers
27 acquiesced in the position of the underwriters. They seem to have regarded the assertion of any claim as so unpromising of beneficial result that it would appear that it was not even practicable to combine enough of the claimants to raise, even by small contributions, a common fund to bear the expenses of litigation to test the sufficiency of the plea of the insurers; and even now, after the lapse of more than twelve years, this court is asked in this cause for a pioneer judgment upon this question. It does not, therefore, upon the part of the defendant, impute to the plaintiff's testator gross improvidence to claim that some ten years ago, nearly two years after the fire, he deliberately and intelligently surrendered all demand against the defendants, in consideration of the return to him of the entire consideration which he had paid to them for their asserted liability. They did return to him that entire consideration—the quota for 1865 was never demanded, and was remitted by the resolution of defendants' standing committee of May 17, 1865. The original premium was returned to him in the form of a credit for the risk under the new policy on the replaced buildings; in consideration of that premium the society carried the risk for 1867 and subsequent years upon these new buildings, and if they had been destroyed by fire would have been liable to pay to the extent of $20,000. If these buildings had been burned and the insurance-money paid, there could be even no apparent inadequacy in the consideration received by the plaintiff's testator for the surrender of all claim under the old policies; but in the legal aspect of the question this would have made no difference, the company paid as full value in law for the premium in carrying the risk as it would have paid if accident had imposed upon its treasury a draft for the full amount of the insurance.

It appears, then, that in this cause claim is asserted against the defendants to make good a loss for which not a dollar of consideration is in their treasury. If the result of the litigation be favorable to the plaintiff, his recovery must certainly be subject to credit for the original premium and the quota of 1865; if it be favorable to the defendants, it cannot entitle them to a judgment for that premium and quota; in other words, the enjoyment of the consideration by the defendants is conditioned upon their bearing the burthen of the loss, and the burthen of paying the consideration by the plaintiff is conditioned upon his enjoyment of the benefit of the insurance-money. This want of reciprocity in the position of the litigants must be rightfully abbreviated to the plaintiff's testator: if there had been reason to allege that he was misled and entrapped by the defendants into the acceptance of the return of the premium and the release of the quota of 1865, it would still seem to have been necessary for him before bringing his suit to lay a proper foundation for his claim by tendering payment of the premium and the quota, and conceding to the defendants the benefit of some consideration for the liability he claimed to fasten upon them.

28 The plea of accord and satisfaction would have been an admissible plea in this action (7 Rob. Pr., 526; 1 Selwyn's N. P., 534), and under the agreement as to the pleadings the defendants are entitled to the benefit of it as if formally pleaded. If Mr. Græme at the time of negotiating with the society for the new policies had intended to surrender all claims against the defendants under the old policies, and to accept in satisfaction the credit upon the new of the premium paid upon the old, as soon as such credit was given and accepted, a full accord and satisfaction of the claim now asserted was consummated. If, however, he did not so intend, but purposed all the time to reserve his claim under the old policies, such reservation was a most material fact which he was bound to communicate and had no right to conceal, and the concealment of which misled the defendants into the surrender to him of the entire consideration upon which any liability under the old policies could have arisen.

Mr. Bigelow, in his late valuable work upon estoppels, lays down as the result of all the authorities that the following are necessary and sufficient elements to sustain the defence of estoppel by conduct:

1st. There must have been a representation or concealment of material facts.

2nd. The representation must have been made with knowledge of the facts.

3rd. The party to whom it was made must have been ignorant of the truth of the matter.

4th. It must have been made with the intention that the other party should act upon it.

5th. The other party must have been induced to act upon it.

Big. on Est., 480.

Upon the hypothesis of Mr. Græme's intention to reserve the claim now asserted, it seems to me that every element above mentioned appears manifest in this case.

1st. The material fact of the reservation of the claim was concealed.

2nd. The knowledge of that reservation was in his breast.

3rd. The assurance society must have been ignorant of it. The theory upon which they were acting involved the absence of any liability under the old policies, and necessarily implied the abandonment of all claim thereunder upon the part of the persons accepting the benefit of that theory. This theory was communicated to Mr. Græme at the time,

and he accepted the benefit without one word of protest against the theory.

4th. The concealment must have been made with the intention to influence the action of the society. When occasion requires speech, silence is pregnant with significance; this occasion did demand speech, if there was any purpose to reserve a claim inconsistent with the theory on which the benefit was to be conferred; and the significance of silence under such circumstances cannot be misunderstood.

29 5th. The concealment must have induced the action of the society. The silence of Mr. Græme gave tacit assent to their theory. Had he stated at the time that he could not accept the proffered benefit if his acceptance was to be understood as inconsistent with the institution and prosecution of these actions, it cannot be doubted that the new policies would never have been delivered except upon the payment of full premiums. The authority of the officers to give credit for the old premiums was limited by the very words of the resolution of the standing committee of July 31, 1865, to "buildings destroyed during the war under circumstances exonerating the society from liability for loss," and it is impossible to acquit those officers of gross default in duty, and fidelity to their trust, if the conduct of Mr. Græme did not induce them to believe that he regarded and desired the society to regard his buildings as embraced in that description.

I am of opinion, therefore, that upon the facts as they appear in evidence the plea of equitable estoppel must prevail.

This opinion renders it unnecessary to examine or to express any opinion upon the interesting questions arising under other defences asserted by the Mutual Assurance Society.

Judgment must be entered for the defendant in each of the causes.

A true transcript from the records.
Teste.

ALFRED SHEILD, *Clk.*

Fee for record, $10.

Agreement of counsel.

The undersigned, counsel for the plaintiff and defendant in the above case, are also counsel for the same parties respectively in another case, which was decided at the same time by the circuit court and is referred to in its opinion, hereby consent and agree that no other copy of the record but this shall be made, and this record shall be used mutatis mutandis in the other case before the court of appeals if an appeal is allowed.

JAMES LYONS,
WM. W. GORDON,
Counsel for the Pl'ff.
JAMES NEESON,
WM. W. CRUMP,
For the Def'd'ts, the Mut. Assu. Society.

A copy. Teste.

GEO. K. TAYLOR, *C. C.*

30 And at another day, to wit, at a supreme court of appeals, held at the State court-house, in the city of Richmond, on Tuesday, March 33rd, 1880,

This cause was this day partly heard upon the transcript of the record

of the judgment aforesaid and the arguments of counsel, and continued until to-morrow.

And at another day, to wit:

WEDNESDAY, *March 24th*, 1880.

This cause was this day further heard upon the transcript of the record of the judgment aforesaid, and the arguments of counsel and continued until to-morrow.

And at another day, to wit:

THURSDAY, *March 25th*, 1880.

This cause was this day further heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued until to-morrow.

And at another day, to wit:

FRIDAY, *March 26th*, 1880.

This cause was this day fully heard upon the transcript of the
31 record of the judgment aforesaid and the arguments of counsel, but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals, held at the State court-house, in the city of Richmond, on Thursday, November 25th, 1880 (being the day and year first herein mentioned),

Came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion for reasons stated in writing and filed with the record (see No. 5) that there is no error in the said judgment. Therefore it is considered by the court that the same be affirmed, and that the defendant in error recover against the plaintiff in error thirty dollars damages, and its costs by it about its defence herein expended, to be levied of the goods and chattels of the plaintiff's testator in his hands to be administered. Which is ordered to be certified to the said circuit court of the city of Richmond.

32 And afterwards, to wit, at a supreme court of appeals, held at the State court-house, in the city of Richmond, on Friday, December 3rd, 1880,

This day came the plaintiff in error, and filed a petition praying for a rehearing of the judgment rendered herein on the 25th of November, 1880; and the court not being advised of its judgment to be given on said petition, time is taken to consider thereof. (See No. 7.)

And afterwards, to wit:

THURSDAY, *February 17th*, 1881.

Came the parties by their counsel, and the court having maturely considered the petition of the plaintiff in error for a rehearing of the judgment rendered herein on the 25th of November, 1880, and no one of the judges who concurred in that judgment being dissatisfied with it, or desiring such a rehearing, it is ordered that said petition be denied.

33 VIRGINIA,

City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, do hereby certify that the foregoing printed and manuscript record holden at Richmond, Virginia, contains the record and proceedings, with all things concerning the same, in the said supreme court of appeals of Virginia, holden at Richmond aforesaid, in the cause lately depending in said court under the style of Graeme's Executor against The Mutual Assurance Society of Virginia against Fire on Buildings, as appears from the records of my office.

In testimony whereof I hereunto set my hand and annex the seal of the said court this 28th day of September, 1881.

[SEAL.] GEO. K. TAYLOR, *C. C.*

34 To the honorable Morrison R. Waite, Chief Justice of the United States, and judge of the circuit court of the United States for the eastern district of Virginia:

The petition of Robert Gráme, ex'or of John Gráme, dec'd, and of Wellington Goddin, ex'or of Seymour P. Vial, dec'd, respectfully sheweth that they have been very much aggrieved by a decision of the supreme court of appeals of Virginia, which is the court of last resort in that State, in two cases which were heard together, in which your petitioners were appellants, and The Mutual Assurance Society against Fire on Buildings of the State of Virginia were the appellees.

The testators of your petitioners insured in the said society a large amount of property anterior to the late war, which was burnt down by the great fire of 3rd April, 1865.

The first cause of the said fire was the order of the late Confederate Government to General Lee to burn up all the tobacco which was in the city of Richmond, and which might be in danger of falling
35 into the hands of the troops of the United States. Gen'l Lee proceeded on the day mentioned, by his subordinates, with great care and caution, to fire a certain warehouse in Richmond, in which tobacco was stored. The morning was very still and calm, but a strong wind set in after the tobacco was fired which blew the fire from other intermediate buildings to the property of Gráme and Vial respectively, at a great distance, to wit, 1,500 yards, and consumed them entirely.

The suit of your petitioner, Robert Gráme, executor, was an action of covenant in the circuit court of law of the city of Richmond, and that of the petitioner Goddin, executor, was a suit in the court of chancery of the city of Richmond.

The defendant' defended themselves severally upon three grounds, to wit:

I. That they are not liable for the claim, because, by the 12th section of the X article of the rules and regulations of the society, they are exempted from liability for damage by fires which may be occasioned by civil commotion, insurrections, the invasion of a foreign en-
36 emy, &c., and they say that the fire in this case was caused by one or all of these causes.

II. If it was not, the plaintiff is estopped to claim the damage by the fact that John Gráme erected other buildings upon the lot upon which his burnt buildings stood, and insured them in the office of the defendants, and was allowed credit for part of his premiums paid upon the former buildings for the time which elapsed after the fire, and before the expiration of the year.

III. Because he waived his right to claim his damage by his omission to take the preliminary steps and offer preliminary proofs.

The circuit court of Richmond decided the cause in favor of the defendant at law upon the ground of estoppel merely, and did not consider any evidence not applicable to that point.

The chancery court of Richmond decided the cause upon the ground that there was an invasion within the meaning of the 12th section of the X article of the by-laws before cited, and gave a decree in favor of the Mutual Assurance Society.

37 By consent of the parties by their counsel, the case of Vial's executor was heard upon the case agreed. A copy of the record in that case is herewith submitted, and a copy of the arguments upon that case, in behalf of the appellants, marked No. 1, & No. 2, are herewith submitted.

The chancery court, it will be found, decided the cause upon the ground of invasion: but at the same time (p. 78) decided that the troops of the United States which took possession of the city of Richmond upon the morning of the 3rd of April, 1865, were "foreign enemies," and that the firing of the tobacco warehouses by the Confederate Government was an act of war.

A copy of the record in the case of Gráme's ex'or, with the petition of appeal upon it, and a copy of the argument for the appellant are herewith filed, marked No. 3 and 4.

The supreme court of appeals of Virginia heard the cases together, by agreement for convenience, and that court decided that the judgment of the circuit court of law of the city of Richmond was erroneous;

38 but it decided, nevertheless, that that judgment should be affirmed, as well as the decree of the chancery court of Richmond, upon the ground that the invasion of Richmond, as it was termed, by the troops of the United States, was the act of "a foreign enemy," and therefore brought the case within the 12th section of the X article of the by-law, upon which the appellees relied.

That decision took your petitioners utterly by surprise, inflicted upon them great loss and injury, and is wholly erroneous, as they insist. A copy of it, made part of the record by the judgment and decree of the court, and of the dissenting opinion of the honorable Judge Anderson, concurred in by the Hon. Judge Burks, of the same court, are herewith filed, marked No. 5 and 6. Judge Burks also dissented, but gave no written opinion. From that decree your petitioners filed a petition praying for a rehearing of the cases, in which, among the other errors of the said decree of which they complained, your petitioners relied upon the ground that the decision that the Army of the United States was a "foreign enemy," and the United States was a "foreign nation," was contrary to the Constitution of the United States and to

39 the decisions of this honorable court, especially in the case of Williams & Arnett vs. Jason & Bruffy, decided at the October term, 1880.

They also relied upon the ground that there was no invasion by the Army of the United States, because it came into Richmond by the consent of its municipal authorities after a capitulation had been made, and were mainly instrumental in extinguishing the fire. A copy of the petition, and of the addition to the petition for a rehearing, is herewith filed, marked No. 7. But the court overruled the motion and refused to rehear the causes; thus reaffirming its decision that "the Army of the United States was the army of a foreign enemy," and that the United States was a "foreign nation." Copies of the judgment of the court of appeals in each case are herewith filed, marked Nos. 8 & 9.

As something may be said upon the question of the jurisdiction of this honorable court, your petitioners beg leave to submit the following considerations and authorities, as vindicating conclusively the jurisdiction of this honorable court.

The judgment of the supreme court of appeals of Virginia, in fact and law, denies that there is any Constitution of the United States, or government under it, for it decided that it is a "foreign government" when it decides that its army is the army of a "foreign enemy," and any attempt to argue that it has violated any law of the United States or the expressed decision of its Supreme Court we feel would be very much like one of those of whom it was said by a Latin poet, that they were "rarae nantes in gurgite vasto." Argument is exhausted when it is said that there is no Government of the United States, for there can be no law of the United States, and no Supreme Court of the United States, and no United States, if there be no Constitution of the United States under which and by authority of which to make laws and to establish courts. Archimedes is said to have declared that if you give him a fulcrum his lever would overturn the world, but the man who says that there is no such thing as matter, denies in the most emphatic manner that there can be a fulcrum. The army was organized and put in motion as the Army of the United States and not of a "foreign nation," and no other nation but the United States contributed a dollar or a man to it; it was officered and led by officers created and commissioned by the United States and controlled by the President of the United States; no king, or satrap, or foreign officer gave any command to it or any part of it, or directed any of its movements. Its whole object was to protect and preserve the Government of the United States, and not a "foreign government." If it was not, then by what "foreign government" was it commissioned and commanded by? How came it within the United States if it was a "foreign army" without war with the United States? But the Congress of the United States has decided that it was not a "foreign government," for it has decided again and again that the Constitution of the United States and the power of the laws were unbroken notwithstanding the war, and, therefore, it has also decided that the Constitution of the United States might be amended according to the ancient form and prescriptions of the Constitution as it existed before the war, which could not be in rerum naturae if the Government of the United States had become "a foreign government," which it must have become to make its army a "foreign army."

2ndly. But Virginia has by her fundamental law, or present constitution, Art. XI, declared the late war to have been a "civil war," and the Congress of the United States has, by its act ratifying, approving, and confirming the said constitution, also affirmed the same thing, that is, that the war was a "civil war." The decision of the supreme court of Virginia, therefore, disaffirmed and repealed an act of Congress.

3rd. The supreme court of Virginia has denied and refused to observe the authority and decision of this honorable court in the case of Williams & Arnett vs. Jason & Bruffy, October term, 1880, which decided that the laws of the United States were still in force during the war, and prevailing, and therefore Confederate money was not a valid payment, the decision of the supreme court of Virginia to the contrary notwithstanding.

4th. But it has been said that what is called the "Federal question" cannot be made in this court; that is, the court cannot take jurisdic-

tion of a cause unless there is a violation of the Constitution of the United States alleged in the pleadings, meaning thereby the technical pleading, and not the arguments at bar, so that this honorable court may see and did see that the State court did decide against a law of the United States; that is not the law, but only a marvellous witticism, if it is intended thereby to affirm that the opinion of a court, which upon its face denies the law of Congress, and thereby gives the court the whole knowledge which it is necessary to have, is not a part of the pleadings within the meaning of this honorable court; and it is absurd if it means to say that when the opinion of the State court affirms that there is no Constitution of the United States it does not thereby
44 disaffirm or mean to disaffirm a constitutional law, since there can be no constitutional law if there be no constitution; and there can be no constitution if the government has become "foreign," and if it has not become "foreign," its army could not be "foreign." It cannot be anything but absurd to say that the court cannot know and understand what the State court meant to decide as well by its expressed decision as by an inference drawn from a decision by some allegation in the pleading in the cause. In accordance with these views is the opinion of this honorable court in the case of Murdock vs. The City of Memphis, 20 Wallace, 590.

If anything further can be necessary to make the decision of the State court more absurd and ridiculous, it will be had by calling the attention of this honorable court to the fact that the word "foreign," according to that decision, was used in the article in the year 1857 (when we were at peace with everybody) as meant to describe a controversy between ourselves which might take place in 1861.

45 I consider the judgment of the court of last resort in Virginia as erroneous and contrary to the Constitution of the United States, for the reasons assigned, and respectfully pray that his honor Morrison R. Waite, Chief Justice, and judge of the circuit court of the State of Virginia, will award a writ of error commanding, etc.

JAMES LYONS,
An Attorney practicing in the Supreme Court of the U. S. and Counsel for the Petitioners.

MAY 11, 1881.

46 Know all men by these presents that we Robert Græme and John Grame are held and firmly bound unto The Mutual Assurance Society of Virginia in the full and just sum of two hundred and fifty dollars, to be paid to the said The Mutual Assurance Society of Virginia, to its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-third day of May in the year of our Lord one thousand eight hundred & eighty-one.

Whereas lately at a session of the supreme court of appeals of the State of Virginia, in a suit depending in said court, between Robert Græme, executor of John Græme, deceased, plaintiff in error, and The Mutual Assurance Society of Virginia, defendant in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Mutual Assurance Society of Virginia, citing and admonishing it to be and appear at a Supreme

Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Robert Græme, ex'or of John Græme, deceased, shall prosecute
47 said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

ROBT. GRÆME. [SEAL.]
JOHN GRÆME. [SEAL.]

Approved by—

M. F PLEASANTS, [SEAL.]
Clk U. S. Circuit Court Ea. Dist. Va.

Approved.

M. R. WAITE, *Chief Justice U. S.*

STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, in said State of Virginia, do hereby certify that the foregoing is a true copy of a bond the original of which is filed in my office.

Given under my hand this 28th day of September, 1881.

GEO. K. TAYLOR, *C. C.*

48 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Robert Grame, executor of John Grame, deceased, plaintiff in error, and The Mutual Assurance Society of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a
49 clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together

with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. Ct U. S.

50 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, in said State of Virginia, do hereby certify that a true copy of the within writ is filed with the papers of the cause of "Graeme's Executor against The Mutual Assurance Society of Virginia against Fire in Buildings," which was lately pending in said court.

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

51 The United States of America to the Mutual Assurance Company of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein Robert Grame, executor of John Grame, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and eighty-one.

M. R. WAITE,
Chief Justice Sup. Ct U. S.

52 Legal service of the within writ is hereby acknowledged, a copy of which has been served upon me as the principal officer of the Mutual Assurance Society of Virginia by the sheriff of the city of Richmond, Virginia.

June 4th, 1881.

HERBERT A. CLAIBORNE,
Principal Agent of the Mutual Assurance Society of Va.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, hereby certify that a copy of the within citation is

filed in the papers of the cause of Graeme's Ex'or ag't The Mutual Assurance Society of Virginia against Fire on Buildings, which cause was lately pending in said court.

Given under my hand this 28th day of September, 1881.

GEO. K. TAYLOR, *C. C.*

(Indorsed:) Rob't Grame, &c., vs. The Mutual Assurance Society of Virginia. (Original citation.)

(Indorsement on cover:) No. 1049. Robert Grame, executor of John Grame, deceased, plaintiff in error, vs. The Mutual Assurance Society of Virginia. Virginia sup. c't appeals. Filed 14th October, 1881.